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On-line Edition

Legislature fails to pass new real estate laws

Two Senate Bills which would have had minor to significant effects on Arizona real estate statutes failed to make it through the Legislature.

Senate Bill 1061, the 1998 "Real Estate Omnibus Bill," became fatally flawed after several amendments which were opposed by the Department were added to the bill.

Had it passed, it would have:

- Defined a "provisional license" as one issued by the Department under which the licensee could practice as a salesperson or broker subject to terms, conditions or restrictions agreed on by the licensee and the Commissioner.

- Clarified the exemption from licensure extended to officers and employees of a corporation acting within the course of their employment and dealing in the corporation's own properties. (Also in Senate Bill 1150, below.)

- Required licensees to submit continuing education certificates with license renewal applications. Since 1997, applicants are required to submit a list of continuing education classes taken and declare that the information is true and correct, and to retain continuing education certificates for five years.

- Required a designated real estate broker to attend a Broker Audit Clinic every other license period rather than once every four years.

- Eliminated the requirement, added in 1997, that a Buyer's Broker Agreement contain the same information as a listing agreement, and be executed in writing as soon as an "agreement" exists. (Also in Senate Bill

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Education and Licensing 'front counter' refurbished

Visitors to the Department's Phoenix office will find comfortable seats and more privacy awaiting them while doing business with the Department, the result of a remodeling project completed in May.

The word 'dual' in 'dual agency' means you have *two* clients

Recently, the Department has heard knowledgeable real estate professionals argue that in a dual agency situation, where a real estate licensee represents both the buyer and the seller, that neither the buyer nor the seller is a "client."

On the contrary, the Commissioner has stated unequivocally that in a dual agency situation the licensee has two clients, the buyer and the seller. Further, the licensee undertaking dual agency is bound by the same statutes and Commissioner's Rules that are applicable when the licensee represents only one party to the transaction. Among these:

- The existence of dual agency must be disclosed to both the buyer and the seller. A.R.S. §32-2153(A) (2) provides for the suspension or revoca-

tion of a real estate license if the licensee acts for more than one party in a transaction without the knowledge or consent of all parties to the transaction.

- Commissioner's Rule R4-28-1101(A) states that "A licensee owes a fiduciary duty to his client and shall protect and promote the interests of the client. The licensee shall also deal fairly with all other parties to the transaction."

- R4-28-1101(B) states that a licensee participating in a real estate transaction shall disclose to all other parties to the transaction any information which the licensee possesses which materially and adversely affects the consideration to be paid by any party to the transaction, including, but not lim-

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Have you violated RESPA today?

Reprinted with permission from the June 1998 edition of the Arizona Journal of Real Estate & Business

One of the primary purposes for which the Real Estate Settlement Procedures Act (RESPA) was adopted was to prevent consumers from being unwittingly steered, in exchange for referral payments, by one settlement service provider to other particular settlement service providers.

RESPA was enacted to hold down the cost of real estate settlement services by eliminating the practice of paying kickbacks and referral fees for the referral of settlement services. More specifically, Section X(a) of RESPA prohibits paying or receiving any "thing of value" in return for referral of settlement services. Section 8(b) prohibits taking a fee or a split of a fee for services which are not provided or which are performed by someone else. A "thing of value" is not limited to a monetary amount and may include many different types of consideration. This article will discuss various scenarios which may place a real estate licensee in violation of RESPA. A discussion of Controlled Business Arrangements and the statutory exemptions to Section 8 are beyond the scope of this article.

What is a "settlement service" under RESPA?

A settlement service includes any service provided in connection with a prospective or actual real estate closing. Examples include, but are not limited to the following: rendering credit reports and appraisals, mortgage loan services, title services, mortgage insurance, hazard and home warranty insurance services, services by a real estate broker or agent, and conducting the closing.

Who investigates alleged Section 8 violations of RESPA and what are the penalties for violating Section 8? Violations of Section 8 are initially investigated through the U.S. Department of Housing and Urban Development (HUD) and are generally in response to complaints submitted by the public regarding a specific activity. If HUD determines that Section 8 may have been violated, the case is referred to the Department of Justice.

The penalties for illegal kickbacks and referrals under Section 8 may involve a civil fine of up to \$10,000 and/or

a criminal penalty of up to one year of imprisonment. A person found liable under Section 8 will be liable to the person or persons whose business was referred in an amount equal to three (3) times the amount paid by the consumer for the settlement service.

Can a real estate agent and a mortgage lender or title company advertise their services together in the same advertisement?

The simple answer to this question is "yes" because RESPA does not specifically prevent joint advertising between service providers. However, HUD has investigated complaints from the public, which may be submitted by the competitor of the alleged violator, regarding joint advertising.

A typical joint advertising complaint concerns the situation where the real estate agent takes out a full-page advertisement in a home buyer's magazine together with the agent's "preferred" title company or lender. In this and similar situations RESPA will consider whether each party is paying for its pro-rata share of the advertisement.

If the "preferred" title company or lender pays the entire cost of the agent's ad or for more than its pro-rata part based upon the size of each party's ad space, a RESPA violation may exist. The payment by the title company or mortgage lender for the real estate agent's pro-rata share of the advertisement may be considered an indirect method of paying an illegal kickback based upon the agent's referral of title or mortgage business. Accordingly, while RESPA does not specifically prevent joint advertising between service providers, the amount of ad space designated to each service provider must be proportionate to each provider's payment for the advertisement.

An argument has been made that the pro-rata share of the advertisement cost should be based not upon the amount of ad space, but upon the amount of business generated from the ad. While this argument may have merit, it appears to be outside the current "safe harbor" approach which permits joint advertising based upon each party's pro-rata share of ad space.

In a related matter there has also been concern that the practice of certain title companies of printing advertising

materials for real estate agents without charge would constitute a "thing of value" under Section 8. If the real estate agent is receiving free printing services from the title company which the agent consistently refers buyers, it creates an appearance of an illegal kickback or referral fee under Section 8.

Can a mortgage lending company provide ownership shares in its company to real estate agents in exchange for referrals of home buyers?

ABC Mortgage Company sells one share or division of its company to real estate agents for \$500. Subsequently, each real estate agent's ownership percentage in the mortgage company is based upon the number of home buyers which were referred to ABC Mortgage for real estate loans. HUD has determined that this type of arrangement constitutes a RESPA violation because the percentage of ownership interest for each real estate agent is dependent upon the amount of business referred to the mortgage company and not upon the agent's actual ownership interest. Accordingly, this method of rewarding referring real estate agents with a greater percentage of return on ownership interest represents an indirect method of paying a kickback based upon the amount of business referred and violates Section 8 of RESPA.

Can a real estate mortgage lender establish a contest for real estate agents under which the agent who refers the lender with the most business in the month of June will win a free vacation package?

This practice is prohibited under RESPA because the free vacation, or the opportunity to win a free vacation, constitutes a "thing of value" given in exchange for the referral of business.

Can a title company or mortgage lender agree to print up personalized note pads for a real estate agent and pay the postage for mailing those note pads to the agent's farm area?

In this situation, the costs associated with the printing and mailing of the real estate agent's note pads could be a "thing of value" under RESPA given in exchange for the referral of loan or title business, because it defrays a marketing expense that the real estate agent would otherwise incur.

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Jerry Holt

News From The Commissioner

As you read in the story on page 1, two bills that would have made your life as a real estate professional much easier failed in the Legislature.

It's unfortunate that the changes can't be made this year. We would have been able to do away with the requirement that you list your continuing education courses on a renewal application and retain the continuing education certificates for five years, and the requirement for a buyer's broker agreement to contain the same elements as a listing agreement, and be in writing. Perhaps next year.

LATE RENEWALS

The Department continues to be concerned by late renewals. For nearly a year now, one out of every seven licensees has submitted a late renewal application.

Presently, when a licensee submits a late renewal application, the Department will not process the application until our Auditing and Investigations Division has determined just what real estate transactions were conducted during the unlicensed period. This process can take several weeks, and can have a

significant financial impact because the licensee is not permitted to transact business unless the renewal is granted and the license is returned to active status.

The licensee is usually offered a Consent Order in which it is agreed that the licensee will offer to refund all commissions received or expected to be received which were earned during the unlicensed period. The late renewal fee is \$10 more than the regular renewal fee.

We expect to amend Commissioner's Rule (A.A.C.) R4-28-301 and institute graduated renewal fees. A salesperson renewing on time would be charged \$60, the fee provided by the present rule. The fee would increase \$10 per month for each month the renewal is late for six months to a maximum of \$120. The broker timely renewal fee would remain \$125, the fee provided by the present rule, and increase \$20 per month for six months up to six months, to a maximum of \$245. The maximum renewal fee authorized by statute is \$120 for a salesperson's license and \$250 for a broker's license.

The Department will no longer

withhold approval of an application for renewal on the basis of an applicant's unlicensed activity except for special circumstances, such as a complaint or recurring violations by the applicant. Even where renewal is granted, the Department will retain the discretion to investigate and impose sanctions for unlicensed activity, whether through a disciplinary proceeding, consent order or other means.

STATUS OF THE RULES PACKAGE

Work on the 1998 Rules Package is on track. We plan to submit the Economic Impact Statement and proposed rule changes to the Secretary of State in June for publication in the July issue of the Arizona Administrative Register.

Public hearings will be held in August in Phoenix and Tucson. A Governor's Regulatory Review Council hearing will be held soon after, and the rule changes will take effect in October.

The preliminary rules package has been posted on our web site at <http://www.adre.org> since March 26. The proposed rules package will be posted there as soon as it is available.

Although this is a major rewrite, many of the changes are to reorganize, clarify and formalize requirements. Many rules are obsolete, having been replaced by statute or require updating due to legislative changes, including the adoption of time frames for issuance of licenses as mandated by regulatory reform legislation. You should be familiar with these changes. Those lacking web access may inspect the Rules Package at our Phoenix or Tucson office.

Continued from page 2

Can the payment of rent from a settlement service provider to real estate brokerage office represent an illegal kickback to the real estate broker for the referral of business?

Assume ABC Mortgage agrees to rent a desk at the office of XYZ Real Estate for \$4,000 a month. Real estate agents at XYZ Real Estate are charged a desk fee of \$1,000 a month and receive similar services. XYZ Real Estate refers numerous borrowers to ABC Mortgage each month. In this example, HUD would closely examine the facts to determine whether ABC Mortgage rental payment bears a "reasonable relationship" to the market value of the rental space and services furnished. Would the real estate broker charge a similar fee if a non-service provider were to

rent desk space? If the rental payment exceeds the general market value for the space and services provided, then HUD may consider the rental payment as a disguised referral fee or kickback in violation of Section 8 of RESPA.

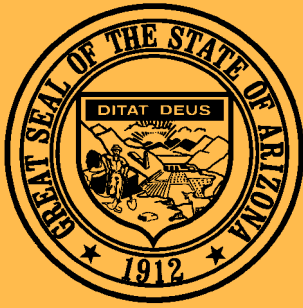
Can a real estate brokerage place specific quotas on its real estate agents regarding the number of referrals to an affiliated service provider as a condition of employment?

XYZ Real Estate, which has an ownership interest in ABC Mortgage Company and AAA Title Company, requires its real estate agents to refer two home buyers to ABC Mortgage Company each month and to open all escrows with AAA Title Company. XYZ Real Estate terminates the employment of any agent which fails to meet the referral

quotas. This practice by a real estate company involves a "disincentive", which HUD considers as a retaliatory action against employees and more appropriately governed by State laws.

Considering the sanctions which may be imposed for violating RESPA, each real estate agent should carefully scrutinize arrangements with service providers. A violation of RESPA, which may result in a civil judgment or a criminal conviction, could in turn lead to a disciplinary administrative action against your license by the Department of Real Estate.

Richard Blair is an attorney, a loan officer with Irwin Mortgage and a former Administrative Law Judge for the Arizona department of Real Estate. He can be reached at the Scottsdale branch of Irwin Mortgage at 602/998-8200.



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1998 Schedule of Broker Audit Clinics

A.R.S. § 32-2136 requires all newly licensed real estate brokers to attend a Broker Audit Clinic presented by the Department within 90 days of issuance of their original broker's license. *Effective July 21, 1997, all designated real estate brokers must also attend a Broker Audit Clinic within 90 days after becoming a designated broker unless the broker has attended an audit clinic during the broker's current licensing period.* All designated brokers shall attend a broker audit clinic once during every four-year period after their initial attendance.

Seating is limited and reservations are required. To make a reservation for a Phoenix clinic, call the Department's Customer Services Division at (602) 468-1414, extension 100. In Tucson, call (520) 628-6940. Those who fail to make reservations will be turned away if seating is not available. Brokers who attend will receive three hours of continuing education credit in the category of Commissioner's Rules.

The following is the schedule of Clinics to be offered in Phoenix and Tucson during the remainder of 1998. Additional clinics may be scheduled from time to time at other locations in Phoenix and in rural areas.

PHOENIX
Industrial Commission Auditorium
800 W. Washington

Noon - 3 p.m.

June 19 and 26
July 13, 14 and 17
August 21
September 18
October 23
November 20
December 18

TUCSON
State Office Building
400 W. Congress
Room 158

8:30 a.m. - 11:30 a.m.

June 11
July 16
August 20
September 17
October 22
November 19
December 17

The mission of the
Arizona Department of Real Estate
is to safeguard and promote the public interest
through timely and capable assistance,
fair and balanced regulation,
and sound and effective education.

ADMINISTRATIVE ACTIONS

REVOCATIONS

H-1925

Frank G. Velez
Yuma

DATE OF ORDER: March 3, 1998

FINDINGS OF FACT: The Department issued Respondent an original real estate salesperson's license in November 1992.

In January 1997, Maria Perez contacted Respondent to purchase a property in Yuma and gave Respondent a cashier's check in the amount of \$6,250 to be deposited with the Yuma Title & Trust Company as a down payment.

Respondent altered the check and tendered it to First Nationwide Mortgage Company as a mortgage payment on his residence. After Perez received letters from the title company indicating that her down payment had not been received, she contacted Respondent who first told her he had deposited the check with the title company, then a few days later admitted he had used her money to make his mortgage payment.

On March 25, 1997, Respondent was arrested by the Yuma Police Department for Forgery and Fraudulent Schemes. On June 10, 1997, Respondent was indicted in Yuma County Superior Court and charged with Theft, a class 3 felony, and Forgery, a class 4 felony. In August 1997, Respondent entered into a plea agreement in which he pleaded guilty to Forgery, a class 4 felony. The theft charge was dismissed and respondent was required to pay \$6,250 in restitution. There is no evidence Respondent has paid the restitution. Respondent was placed on 36 months' supervised probation and served 60 days in jail.

Respondent failed to notify the Commissioner of his conviction within 10 days as required by A.A.C. R4-28-302(C)(1).

In December 1997, a Notice of Hearing and Complaint was filed against Respondent. Respondent failed to file an answer.

VIOLATIONS: Respondent: breached his fiduciary duty to act in his client's best interest in violation of A.A.C. R4-28-1101(A); failed to notify the Commissioner of his conviction within 10 days as required by A.A.C. R4-28-301(C)(1); engaged in substantial misrepresentations within the meaning of A.R.S. § 32-2153(A)(1) and (B)(3); violated the provisions of Arizona Revised Statutes, Title 32, Chapter 20 and the Commissioner's Rules within the meaning of A.R.S. § 32-2153(A)(3); commingled his client's money with his own or converted that money to his own within the meaning of A.R.S. § 32-2153(A)(16); demonstrated negligence in performing acts for which his license is required within the meaning of A.R.S. § 32-2153(A)(22); was convicted of Forgery, a class 4 felony, within the meaning of A.R.S. § 32-2153(B)(2); was found guilty of conduct which constitutes fraud or dishonest dealings within the meaning of A.R.S. § 32-2153(B)(5); has not shown that he is a person of honesty, truthfulness and good character within the meaning of A.R.S. § 32-2153(B)(7); has violated state laws, regulations and rules involving forgery within the meaning of A.R.S. §

32-2153(B)(10).

DISPOSITION: Respondent's real estate license is revoked and he is assessed a civil penalty in the amount of \$5,000.

H-1932

Brenda Brock, aka Brend Hall
Phoenix

DATE OF ORDER: March 19, 1998

FINDINGS OF FACT: In August 1996, Respondent submitted an original application for a real estate salesperson's license in which she disclosed a 1984 conviction for Possession of Cocaine, a felony. The department issued Respondent a real estate salesperson's license which expires on August 31, 1998.

Respondent failed to disclose that she was arrested in Montana for DUI, failed to appear for trial, and a felony warrant was issued by a Montana Justice of the Peace for Bail Jumping, or that she was convicted of two counts of Aggravated DUI With Minor Present in Gila County in 1997.

On February 5, 1998, the Department summarily suspended Respondent's license and served her with a Notice of Right to Request a Hearing. Respondent did not request a hearing. DISPOSITION: Respondent's real estate salesperson's license is revoked.

H-1934

Danielle Dingman
Black Canyon City

DATE OF ORDER: April 1, 1998

FINDINGS OF FACT: Respondent was issued an original real estate salesperson's license in September 1988. From 1993 to 1996, Respondent was employed by the Black Canyon City Fire Department as an administrative assistant. In February 1997, she was charged with knowingly controlling property of the Fire Department (cash with a value of \$250 or more but less than \$1,000) with the intent to deprive the Fire Department of such property. On February 25, 1997, she entered into a plea agreement in which she pleaded guilty to Theft, a class 6 felony.

She was incarcerated in the Yavapai County Jail for 60 days and ordered to pay restitution.

On February 9, 1998, a Notice of Hearing and Complaint was filed against Respondent. Respondent failed to answer the notice.

VIOLATIONS: Respondent violated provisions of Title 32, Chapter 20, Arizona Revised Statutes within the meaning of A.R.S. § 32-2153(A)(3); has been convicted of a crime of Theft, a class 6 felony, within the meaning of A.R.S. § 32-2153(B)(2); engaged in substantial misrepresentations within the meaning of A.R.S. § 32-2153(A)(1) and (B)(3); was found guilty of conduct which constitutes fraud or dishonest dealings within the meaning of A.R.S. § 32-2153(B)(5); has not shown she is a person of honesty, truthfulness and good character within the meaning of A.R.S. § 32-2153(B)(7); violated state laws, regulations and rules involving theft, substantial misrepresentations and dishonest dealings within the meaning of A.R.S. § 32-2153(B)(10).

DISPOSITION: Respondent's real estate salesperson's license is revoked. Respondent assessed a civil penalty in the amount of \$2,000.

CONSENT ORDERS

H-1946

Dixie Lovingier and Dixie's Desert Realty, Inc.
Ajo

DATE OF ORDER: April 9, 1998

FINDINGS OF FACT: Lovingier was issued an original real estate broker's license in November 1995. The license expired November 30, 1997. At all times material to this matter, Lovingier was the designated broker of Dixie's Desert Realty, Inc., a corporation licensed as a real estate broker.

Dixie's Desert Realty was issued an original corporate real estate broker's license in October 1996. That license expires October 31, 1998.

On March 20, 1998, during a telephone conversation with the Department, Lovingier learned that her license had expired. On March 25, she submitted a late renewal application disclosing that Dixie's Desert Realty had earned \$5,285 in commissions on transactions after expiration of Respondent's license.

Lovingier attests that she did not receive the Department's license renewal notice and forgot about the renewal date. She acknowledged her responsibility to renew her license despite not receiving the renewal notification.

VIOLATIONS: Lovingier and Dixie's desert Realty provided real estate services for which a license is required after expiration of Lovingier's license and while Lovingier was not properly licensed, in violations of A.R.S. § 32-2130(B). Lovingier engaged in the business of a real estate broker without holding a license as prescribed by Arizona Revised Statutes, Title 32, Chapter 20, within the meaning of A.R.S. § 32-2153(B)(6). She failed to pay the biennial license renewal fee to the Department on or before the time specified, in violation of A.R.S. § 32-2153(A)(14). Lovingier and Dixie's Desert Realty demonstrated negligence in performing any act for which a license is required by continuing to offer real estate services after Lovingier's license expired, in violation of A.R.S. § 32-2153(A)(22). Lovingier and Dixie's Desert Realty disregarded or violated provisions of Arizona Revised Statutes, Title 32, Chapter 20, within the meaning of A.R.S. § 32-2153(A)(3). DISPOSITION: Lovingier and Dixie's desert Realty, jointly and severally, are assessed a civil penalty of \$500. Lovingier shall take three hours of approved real estate continuing education, in addition to hours required for license renewal, as directed by the Department. Lovingier shall develop and document in-house procedures to track current/active license status, and shall submit those procedures to the Department. The renewal of Lovingier's license is granted.

H-1950

Sandra Wilken Luxury Properties, L.L.C., dba Sandra Wilken Luxury Properties, and Barbara Graham, and in the matter of the

real estate salesperson's license of Barbara Lerner Scottsdale

DATE OF ORDER: May 5, 1998

FINDINGS OF FACT: Lerner was issued an original real estate salesperson's license in February 1995. Her license expired February 28, 1998. At all times material to this matter, Lerner was employed as a salesperson by Sandra Wilken Luxury Properties, L.L.C. dba Sandra Wilken Luxury Properties (SWLP), a limited liability company licensed as a real estate broker.

Between March 1, 1998 through April 6, 1998, Lerner provided real estate services while her license was expired. She submitted a late renewal application to the Department on April 6, 1998.

Barbara Graham was appointed designated broker of SWLP in August 1997. As designated broker of SWLP, she is responsible to ensure that salespersons and associate brokers employed by SWLP are currently and actively licensed to the limited liability company.

During the unlicensed period, Lerner acted as a real estate salesperson on behalf of SWLP in three transactions. She disclosed anticipated receipt of \$22,075.88 on three transactions which had not closed escrow.

Lerner states that her failure to renew her license on time was due in part to misreading the expiration date. Graham states that her failure to supervise Lerner's timely renewal was due in part to Lerner misreading the expiration date of her license and Lerner presuming that her license expired in March 1998.

As an aggravating factor, SWLP, by and through a previous designated broker, conducted activities in 1997 after its license expired, resulting in similar violations.

VIOLATIONS: Lerner engaged in business re-

quiring a real estate license while not properly licensed to do so in violation of A.R.S. § 32-2153(B)(6). She received or anticipates receiving compensation while her license was expired in violation of A.R.S. §§ 32-2153(A)(10) and 32-2155(A). She failed to pay the Commissioner the biennial renewal fee promptly and before the time specified, in violation of A.R.S. § 32-2153(A)(14).

SWLP employed and paid, or anticipates paying, compensation to a salesperson whose license had expired, in violation of A.R.S. §§ 32-2153(A)(6), 2153 (A)(10) and 32-2155(A).

Graham, as designated broker for SWLP, failed to exercise reasonable supervision over the activities of Lerner, a licensee under its employ, in violation of A.R.S. § 32-2153(A)(21). By allowing Lerner to continue to represent SWLP after Lerner's license expired, Graham demonstrated negligence in performing an act for which a license is required, in violation of A.R.S. § 32-2153(A)(22). SWLP and Lerner disregarded or violated the provisions of Arizona Revised Statutes, Title 32, Chapter 20, within the meaning of A.R.S. § 32-2153(A)(3).

DISPOSITION: Lerner's renewal is granted and she may return to active status upon submission of applicable forms and fees. She is assessed a civil penalty in the amount of \$500. SWLP and Graham, jointly and severally, are assessed a civil penalty of \$750. Lerner and Graham shall take six hours of approved real estate continuing education, in addition to hours required for license renewal, as directed by the Department.

SWLP and Lerner shall offer to refund commissions earned while Lerner's license was expired. SWLP shall develop, document and implement in-house procedures for the office to use to track license expiration dates and to prevent a recurrence of the violations cited herein.

Bills fail in legislature

Continued from page 1

1150.)

- Authorized a developer to prepare a final public report for use in *the lease* of unsubdivided lands. Current law authorizes the developer to prepare the report only for *the sale* of unsubdivided lands.

- Clarified the requirements for notifying the Commissioner of a material change to a time-share project plan.

- Clarified the Commissioner's power to exempt the sale or lease of certain time-share intervals from the provisions of law relating to time-shares.

The bill was amended to remove counties' authority to impose any use restrictions on residentially zoned property conditioned on or otherwise based solely or partially on multiple ownership of the property, as long as the property is not a time-share.

Another amendment would have clarified that "special compensation" does not include fees received by a corporation for activities undertaken in the course of exercising fiduciary duties, and to exempt real estate investment trusts from the nonlicensure provisions provided in the bill.

The bill died in conference committee.

Senate Bill 1150, introduced by Sen. Carol Springer, (R-Prescott), would have made other changes in real estate statutes and incorporated some of the provisions of the Real Estate Omnibus Bill.

- Redefined the term "barrier" as it applies to subdivision statutes.

- Shortened the "grace period" for renewal of an expired real estate license from one year to six months, and imposed a \$100 late renewal fee rather than the current \$10 late renewal fee.

Although Senate Bill 1150 was approved by the Senate, the bill was withheld from a final House vote.

Other legislation was introduced which would affect real estate licensees directly or indirectly. Some of it was passed; some of it died.

House Bill 2518, signed by the Governor, authorizes a study program which will authorize Arizona State agencies to accept "electronic signatures" on documents filed with the agency through the Internet.

House Bill 2583, which was held in a House committee, would have au-

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You do have web access, don't you?

As you may have read in the story on page 7, the National Association of Realtors® determined through a nationwide survey that 95 percent of its broker members have a World Wide Web site or participate in a site.

If there's any doubt in your mind that Arizona real estate brokers and salespersons are using the web, point your web browser to the popular search engine "AltaVista" at

www.altavista.digital.com
and enter

arizona real estate
as the search words. AltaVista will report that those three words appear on 2,811,388 documents on the World Wide Web! That doesn't mean there are 2.8 million Arizona real estate web pages; many of the "hits" are duplicates. But we believe there are more than 600 web pages created by Arizona

real estate licensees.

The Department of Real Estate site at www.adre.org receives an average of 92 visitors each day, not bad for a regulatory agency. Of these, an average of 36 visitors check our Late-Breaking News, and 62 look at the Table of Contents. The number of downloads of the *Arizona Real Estate Bulletin* is approaching the number of paid subscriptions.

We believe many people check our Late-Breaking News page about once a month, but to stay abreast of new developments, we suggest you check it at least weekly. You'll find more than just news about the Department. We frequently post information about new web services of interest to the real estate professional, news from other state agencies we think you should know about, and links to helpful web sites.

Continued from page 6

thorized a residential leasing agent or manager to pay a tenant a referral fee of as much as \$100 for arranging an introduction to a prospective tenant.

Senate Bill 1030 would have made it illegal for a state agency to require state-regulated professionals to supply a home address or telephone number, if business address and telephone number were available, on a license application.

Senate Bill 1093, the "Funeral Board Omnibus Bill" was signed by the Governor. Among many changes affecting the funeral industry, it amends A.R.S. §§ 32-2194.03 and 2194-04 (real estate statutes) to require the Commissioner to notify the State Board of Funeral Directors and Embalmers when the Commissioner issues a Certificate of Authority to operate a cemetery. It allows the Commissioner to deny issuance of the certificate if the sale of plots within the cemetery would constitute misrepresentation to or deceit or fraud of the purchasers. The bill also requires cemetery brokers and salespersons to disclose the policy of the cemetery regarding cancellations of contracts, including whether the cemetery issues refunds under canceled contracts.

Senate Bill 1260, which failed in the Senate, would have, among other things, compelled the Commissioner to accept the recommended order of an Administrative Law Judge resulting from an administrative hearing.

Senate Bill 1331, which would have directed the Arizona Department of Public Safety to establish a sex offender web site, on which the DPS would have posted the residence address and photograph of convicted sex offenders, failed to obtain approval of the Senate Committee of the Whole.

When Senate Bill 1357, which would have required the Registrar of Contractors to license home inspectors, was presented to the House Committee of the Whole, a striker amendment was added which changed the bill to regulate the sale of fireworks.

Senate Bill 1034 made substantial changes to Title 41, Chapter 6 of Arizona Revised Statutes and should be of interest to attorneys representing real estate licensees in administrative hearings.

The Department plans to publish the 1998 edition of the *Arizona Real Estate Law Book*, which will contain all changes to statutes published in previous editions, in August.

Survey shows brokers doing well but wary of past recessions

Reprinted with permission from the May issue of the *Arizona Realtor® Digest*

Brokers today are doing well financially, are growing their agencies, and are vigorously embracing technology — but, according to a survey of brokers across the country by Real Estate Broker's Insider, they remember the real estate recessions of the 1980s and 1990s and are being prudently cautious about over-expansion.

Jumping on the Internet bandwagon

Brokers are learning about the Internet, getting on the Internet, and doing some business on the Internet. Almost all respondents (95 percent) have a web site or have joined a group site.

Interestingly, the respondents' assessment of the usefulness of the 'net ranged from enthusiastic (from California: "Many inquires, six specific sales") to the disappointed ("It's working very slightly so far, after six months," from New Jersey).

One broker penned an interesting viewpoint on his questionnaire: "The largest missed opportunity for brokers and Realtors® alike is due to a fear, and a lack of understanding, of the Internet. The more you understand," noted this Texan, "the more money you will make."

Asked to look into their crystal balls, the brokers surveyed say — guess what? More technology. Nearly a third (31.5 percent) foresee what will apparently be a totally automated business. As one Minnesota broker put it, in the future, the real estate business will be run "not from the seat of the pants but from a laptop."

Shrinking profits, expanding firms

Some 68 percent of the respondents to the Insider survey said their biggest worries today are "retaining more of the company dollar," "shrinking profits," "rising business costs," and "declining revenue."

More than a third (36.8 percent) said recruiting good agents and retaining them was also one of their biggest worries.

Some coupled this with the problems of rising commissions and retaining more of the company dollar

Recent changes in business. Other changes in their businesses noted by respondents were:

- increased use of technology
- lower net revenue
- increased specialization.

A broker from Nebraska scribbled on his questionnaire what may be a clarion call in the future for successful brokers: "We've embraced one-stop shopping." More brokers may follow his example if reform of the Real Estate Settlement Procedures Act (RESPA) clears the way for more bundling of services within the brokerage.

As a matter of fact, RESPA is the biggest regulatory concern of the brokers surveyed by the Insider. Though regulatory concerns of brokers and managers ranged all the way from sign control in Washington state to consumer fraud (a New Jersey respondent) and on to "Fair Housing Councils suing brokers about their ads," Pennsylvania), the largest number of respondents — 16 percent — complained about RESPA, now being studied by the U.S. Department of Housing and Urban Development. A Pennsylvania respondent penciled in a plea that regulators should permit one-stop shopping in the real estate industry.

Where are the new opportunities?

The most-mentioned new opportunity was a surprise to the Insider: 16 percent of respondents voted for commercial real estate. "There's a commercial resurgence," commented a New Jersey respondent. "Commercial real estate has less competition and less control by the National Association of Realtors," wrote another.

The second most cited opportunity was "making technology work for you." Niche markets also got a few votes from respondents as a source of new opportunities, notably the market niche catering to minority and immigrant buyers.

The survey was published in the February issue of the Real Estate Broker's Insider, a twice-monthly newsletter that provides information about how to run a profitable real estate agency. For survey details or subscription information, fax Jody Canning: 212/228-0376.

'Cramming' is the newest phone scam

The following is reprinted, with permission, from the April 1998 issue of the Arizona Bulletin, published by the Arizona Better Business Bureau.

The Better Business Bureau is cautioning businesses about an emerging phone scam known as "cramming," the practice of adding services to phone bills without the knowledge or consent of the billed party. In some cases, consumers report that they were tricked into adding services when they filled out a sweepstakes entry form or other materials that they were unaware would authorize additional services.

Similar to phone slamming — an unscrupulous practice that switches a long-distance carrier without permission — cramming occurs when consumers or businesses are charged for optional, additional services without prior agreement. The services might be personal 800 numbers, paging services, voice mail, caller ID or call waiting. Charges generally appear on telephone bills as would any third-party billing. The charges have no connection with the local telephone provider. In fact, the third-party company appearing on the local phone bill is often simply a billing service working on behalf of yet another company that provides the unauthorized telephone product.

Long before cramming was nationally recognized as a deceptive practice, the Phoenix Better Business Bureau processed numerous complaints about such billing problems. Integretel, Inc., based in San Jose, Calif., has generated a number of complaints from the Phoenix area during the past three years.

According to the San Jose Better Business Bureau, the company performs billing services for other firms, including American Tel Net, ID Direct, Interactive Billing Services and VRS Billing Services. Integretel has an unsatisfactory record with the San Diego Better Business Bureau due to a pattern of not responding to complaints. The complaints commonly allege unauthorized billings for telephone services.

If you think you've been crammed or slammed, contact the Arizona Better Business Bureau at 602/264-1721.

What happens when someone files a formal complaint against a real estate licensee?

Few licensees understand what happens when a disgruntled client files a formal complaint alleging that the licensee has violated provisions of the real estate statutes or Commissioner's Rules. Few non-licensees understand how they may file such a complaint and what happens after it is filed.

The following is a description of the process the Department follows in response to a written complaint against a real estate licensee. All investigative and enforcement matters, including administrative hearings, are conducted pursuant to provisions of the Arizona Revised Statutes ("A.R.S.") and the Commissioner's Rules ("A.A.C.").

STARTING THE PROCESS

To proceed with an investigation of a complaint against a licensee, the Department must determine two things:

1. The complaint or information relates to possible violations of real estate statutes or rules.
2. Those involved are under the Department's jurisdiction, meaning that they have been issued a "license" by the Department. This includes real estate, cemetery and membership camping salespersons and brokers (including business entities such as partnerships, corporations, and limited liability companies) which hold *or should hold* licenses; those who have applied for a license; and persons or businesses selling or leasing subdivided or unsubdivided lands, time-share intervals, cemetery property or membership camping contracts.

In many cases, the Department does not have jurisdiction over complaints. Examples are:

- Regulation of homeowner associations (see A.R.S. § 33-1901, *et seq.*);
- Disputes between a landlord and tenant (see A.R.S. § 33-1301, *et seq.*);
- Determining whether a contract is enforceable or legally binding, or whether it may be valid;
- Deciding who's entitled to the earnest money deposit when a deal falls through.
- *The Department is legally prohibited from intervening in*

commission or contractual disputes. The Department cannot advise you about legal matters or disputes involving homeowner's associations, and cannot advise you on the interpretation of the terms of contracts of any kind.

The Department's enforcement of real estate license laws does not provide a way for individuals to collect damages for wrongs done to them, except as a last resort through the Real Estate Recovery Fund.

Communication

The first step in resolving complaints is communication. The Department encourages the complainant to talk to the licensee or developer, and to his or her employer. By talking with the designated broker, or to the owner of the firm before filing a complaint, one may be able to resolve the matter more quickly. The issue can very often be resolved when the parties discuss their respective viewpoints.

If the person involved is a real estate licensee, a complainant may contact the Arizona Association of Realtors®. Approximately half of the real estate brokers and salespersons in Arizona are members of a board or association of Realtors. These members subscribe to a "Code of Ethics," a higher standard of conduct than that imposed by law. Trade organizations will refer complaints to the Department if they believe the license laws have been violated.

INVESTIGATION

A.R.S. § 32-2108 requires that complaints filed with the Department be in writing and verified (sworn before a notary public). The complaint must allege conduct which violates Department laws or rules. A complaint form may be obtained by visiting the Department's offices in Phoenix or Tucson, from the Department's Fax Response Service, or from the Department's web site at www.adre.org.

To obtain the form from the Fax Response Service, your fax machine must be located in Area Code 602 or 520. Call 602/468-1414 and at the voice

greeting, press 3. When asked whether you want a catalog or document, press 1. When asked for a document catalog number, enter 5001. Follow the remaining instructions, and the Complaint Form will be faxed immediately at no cost.

The complaint itself should be clear and concise, stating in detail the facts surrounding the incident(s), including:

- The time and place of occurrences;
- Who was involved or present;
- What activities occurred which you believe to be illegal;
- The names, addresses and telephone numbers of any witnesses.

There is no fee charged for filing a complaint, but you will need to make and attach legible copies of all transaction documents and related correspondence.

The complaint will be reviewed and you will be notified as to which Department representative has been assigned to investigate your complaint. The law prohibits, in most cases, the Department from concealing the name of the person filing the complaint.

Each licensee or developer named in the complaint is sent a copy of the complaint and must provide a sworn, factual answer to each allegation. Each must also attach copies of documents which support their statements. If additional documents or statements are needed, the Department investigator will request or subpoena them.

After review by the assigned representative of the information gathered, a determination is made as to whether the Department believes it can prove that the respondent violated one or more real estate laws or Commissioner's Rules.

Based upon that determination, the decision is made to:

- Close the file without action.
- Send the licensee or developer an administrative warning.
- Refer the case to the Attorney General's Office for prosecution.
- Negotiate settlement by means of a consent order.

- Refer the matter to mediation in lieu of formal disciplinary action (if the parties agree).

Administrative sanctions are not pursued unless warranted by a preponderance of the evidence.

ADMINISTRATIVE ACTIONS

Administrative Hearing

When the Department believes the evidence to be sufficient, it refers the case to the Attorney General's Office. A Notice of Hearing and Complaint is prepared which the Department then sends to the respondent. This notice identifies which statutes or rules the respondent has allegedly violated, and sets a date and time for hearing.

An administrative law judge is assigned to hear the matter on behalf of the Commissioner. These hearings are conducted by the Office of Administrative Hearings in accordance with the Administrative Procedures Act and the Commissioner's Rules, and are recorded by a court reporter. Hearings are held in Phoenix and are open to the public.

After the hearing, the administrative law judge prepares Findings of Fact and Conclusions of Law along with a Recommended Decision. These are sent to the Commissioner with the administrative record, including exhibits. The Commissioner either adopts or modifies the Recommended Decision, then enters a Commissioner's Order. The parties may appeal the decision in Superior Court if certain procedural requirements are followed.

Following an administrative hearing, the Commissioner may take any one or a combination of actions which may include the following:

- Dismissal of all charges: No sanctions are imposed upon nor penalties assessed the respondent.
- Revocation (of license, approval or certificate): The individual or entity is not eligible to conduct business activities unless granted a new license at some future date.
- Suspension (of license, sales, ap-

proval or certificate): The individual's or entity's license is suspended for a specific period of time or until some condition is met. During this period, the individual is not allowed to conduct business.

- Civil penalty: A respondent may be assessed a civil penalty in an amount not to exceed \$1,000 per violation. Funds collected as a result of a civil penalty are placed in the State's General Fund.

If the individual or entity does not comply with the order, the Commissioner may pursue further administrative sanctions.

Consent Order

Many cases are resolved by means of a Consent Order instead of a hearing. Similar to a plea agreement, a Consent Order states facts and discipline to which all parties have agreed. The Director of the Administrative Actions Division negotiates proposed terms, but the Commissioner has final authority in all such cases. Consent Orders are not subject to administrative review by the courts.

PUBLICATION OF ORDERS

All formal administrative actions taken against licensees or developers are a matter of public record and are published in the *Arizona Real Estate Bulletin*.

REVIEWING FILES

Hearing files are available for review. Older files are in storage off-site and must be ordered. If you wish to review a file, contact the Department's Customer Services Division so that the files may be retrieved for your review.

Closed investigation files may also be reviewed. Contact the Customer Services Division to set an appointment to review a file.

Should you have any questions about the complaint process or filing a complaint, please contact the Department's Customer Services Division at 602/468-1414, extension 100.

Department has streamlined application processes

Legislation enacted in 1997 enabled the Department to introduce an "expedited public report" program. In the past, it had taken the Department as long as 10 to 12 weeks to approve and register certain types of public reports. Now, the department may review and approve or deny public reports submit-

ted through the expedited registration program within 15 business days. The Department has been processing the applications within five to seven days.

The Department has also streamlined the issuance of original (new) real estate licenses and renewal applications. Now, when an applicant applies

for a new license by mail, the new license certificate is issued in three to five days. Those who apply in person may obtain their license immediately. A new applicant might pass the State real estate examination in the morning, and enter the real estate profession the same afternoon!

Check with us before choosing a fictitious name for your real estate firm

A long-time real estate broker, let's call her "Jane Smith," dropped by our Phoenix office last week to file a Broker Change Form. Licensed as a self-employed broker, she wished to change the license records to show that she was now "Jane Smith doing business as Unlimited Property Services."

No problem, until the Department checked the name in its data base. Now there was a problem. The name was already taken.

Jane was a bit upset. She had spent more than \$2,000 on signs, stationary, and business cards and name badges for her employees, stuff now headed for the dumpster.

How can you avoid this scenario? It's easy.

1. Call the Secretary of State's Office at 602/542-4285, extension 1, and ask if you can register the name. You might find that the name is already registered by another broker, or that

company outside the real estate profession has registered the name. You'll find out in a minute or two. There's another reason why you should do this. The Broker Change Form (LI-200) with which you apply for a change to a fictitious name, contains this language: "In signing this form, I declare that I am the only person who owns, has exclusive title or legal right to this business name."

2. Then call the Department's Customer Services Division at 602/468-1414, extension 100. Ask them to check our data base to see if anyone is licensed to do business under the name you've selected. It's possible that someone has obtained the name, but has not registered it with the Secretary of State. Again, it takes only a minute or two to have the name checked.

3. File the change form promptly. Don't let someone else beat you to your chosen fictitious name.

4. The possible existence of any lien or encumbrance on any property being transferred in connection with the real estate transaction.

There are states, Georgia among them, that permit a real estate licensee to act as a "facilitator," to take care of the paperwork, to set up an escrow and title insurance, and to collect a fee, but be free of any other responsibility to the buyer or seller. This practice is not legal in Arizona.

Dual agency

Continued from page 1

ited to, the following matters:

1. Any information that the seller or lessor is unable to perform due to defects in title.

2. Any information that the buyer or lessee is, or may be, unable to perform due to insolvency or otherwise.

3. Any material defects existing in any property being transferred.

How to contact ADRE by phone, fax and modem

PHOENIX OFFICE

(602) 468-1414

Division Extension Numbers

Administration 135

Auditing and Investigations 500

Customer Services 100

Education & Licensing 345

Subdivisions 400

Public Information Office 168

Division Fax Numbers

Administration (602) 468-0562

Auditing/Investigations (602) 468-3514

Education and Licensing

(602) 955-6284

Customer Services (602) 468-0562

Subdivisions (602) 955-9361

Public Information Office (602) 955-6284

TUCSON OFFICE

(520) 628-6940

Fax (520) 628-6941

FAX RESPONSE SERVICE

(602) 468-1414, Extension 3

WORLD WIDE WEB

www.adre.org

E-MAIL

cdowns@adre.org

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Phoenix AZ 85018